

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2004AP12
STATE OF WISCONSIN**

Cir. Ct. No. 2001CV1863

**IN COURT OF APPEALS
DISTRICT III**

**SOKAOGON CHIPPEWA COMMUNITY (MOLE LAKE BAND OF LAKE
SUPERIOR CHIPPEWAS) AND SOKAOGON GAMING ENTERPRISE
CORPORATION,**

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

**SCHENCK, S.C. F/K/A SCHENCK AND ASSOCIATES, S.C.,
SHINNERS, HUCOVSKI AND COMPANY, S.C. AND CONTINENTAL
CASUALTY COMPANY,**

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court
for Brown County: PETER J. NAZE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. The appellants, to whom we will collectively refer
as “Shinners,” appeal a judgment entered upon a jury’s verdict holding them liable

in contract to the Sokaogon Chippewa Community (the “Tribe”) and Sokaogon Gaming Enterprise Corporation (SGEC). Essentially, Shinnors contends it was error for the court to allow the Tribe to elect, after verdict, contract damages instead of tort damages because the Tribe was thus able to avoid a deduction for its own contributory negligence. Shinnors also argues there is insufficient evidence to support the verdicts. The Tribe cross-appeals the portion of the court’s judgment reducing the damage award for lost profits to zero after the court determined such damages were too remote. The Tribe also argues it was error when the court declined to submit a punitive damages question to the jury. We affirm in all respects.

Background

¶2 In the 1990s, the Tribe created SGEC to operate its casinos. While the Tribe and SGEC have separate governing bodies, the Tribal Council appoints SGEC’s board of directors and, at all relevant times, some memberships overlapped. Most notably, Paulette Smith, the CEO for SGEC, was also the secretary for the Tribal Council.

¶3 Shinnors, an accounting firm, was initially hired in 1993 to provide auditing services to SGEC for 1993-1995. Shinnors also provided accounting services and an audit through 1996 and assisted in designing and implementing some of SGEC’s internal controls and operating procedures.

¶4 Shinnars was first retained in 1993 to provide audits for the fiscal years ending on September 30 in 1993, 1994, and 1995.¹ Among other things, the contract provided:

If other circumstances relating to the conditions of your records and/or the availability of sufficient competent evidential matter were to arise during the course of our work which in our professional judgment prevents us from completing the audit, we will notify you immediately.

¶5 Shinnars was again retained to audit the Tribe for the fiscal year ending September 30, 1996. The engagement letter Shinnars sent provided in part:

We will conduct the audit in accordance with generally accepted auditing standards Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. ...

We will notify you immediately if circumstances relating to the conditions of your records and/or the availability of sufficient, competent evidential matter arise during the course of our work which in our professional judgment prevent us from completing the audit. ...

Our procedures will include tests of documentary evidence supporting the transactions recorded in the accounts, tests of the physical existence of inventories and direct confirmation of receivables and certain other assets and liabilities by correspondence with selected customers, creditors and banks.

¶6 Tribal revenue comes from two sources: government grants and gaming revenue. One manner of transferring gaming revenue to the Tribe was

¹ The documents utilized are not specifically contracts, but an audit proposal for 1993-1995 and an engagement letter for 1996. However, neither party disputes there was a contract or that these documents are the basis for the contract claims, nor does either party suggest something else as the contract.

through SGEC's "due from Tribe" account. Individuals acting on the Tribe's behalf could submit expenses to SGEC, which paid the expenses for the Tribe.

¶7 In 1995, work began on a septic system project, budgeted at \$150,000. Because the septic system was viewed as an improvement for the casinos, it was treated as a gaming asset to be paid directly by SGEC. Shinnery helped SGEC set up a "construction in progress" account for septic expenses. As of September 30, 1995, about \$77,000 of seemingly legitimate expenses had been posted to the construction account.

¶8 Around October 18, 1995, SGEC paid the first of what turned out to be multiple fraudulent invoices submitted by DuWayne Derickson, the tribal planner and a close associate of tribal chairman Arlyn Ackley. In December 1995, Derickson informed Ackley and Shinnery that the septic system would cost more than estimated. In May 1996, Mike Bugni, the Tribe's controller and financial director, who oversaw payment of septic system invoices, resigned to take a job elsewhere. Before leaving, Bugni informed Shinnery that he was unfamiliar with the details and status of the septic project. Shinnery claims that, at this time, it began to have concerns about the expenditures on the project.

¶9 In July 1996, the tribal auditor—who was not associated with Shinnery—notified the Council that Derickson had misappropriated federal grant money, using it for computers and other unauthorized expenditures. Also in July 1996, representatives from Shinnery spoke to SGEC board members, including Smith, and Tribal Council members, including Ackley, to inform them of concerns with the septic project.

¶10 Shinnery conducted an audit for the fiscal year ending September 30, 1996. Shinnery also told Smith to consider refusing any further payment on septic

project invoices. In October 1996, Shinnars again voiced concerns and informed the Tribe and SGEC that it would not provide the final audit or opinion unless its concerns over the septic system were resolved.²

¶11 In November 1996, Shinnars had Smith send certified letters to invoice payees involved in the septic project to verify their services. No responses were received, because the payees were nonexistent shell companies set up by Derickson to facilitate his embezzlement. In December 1996, the Tribe and SGEC transferred the septic expenses to the “due from Tribe” account and Shinnars continued to refuse to release the audit opinion.

¶12 As early as February 1996, the State of Wisconsin’s Department of Administration, Division of Gaming, had been alerted to potential problems by Tribe members requesting investigation of SGEC. In May 1997, disgruntled Tribe members occupied the bingo hall and tribal offices adjacent to the casinos. State regulators arrived to investigate. The State and the National Indian Gaming Commission (NIGC) recommended the Tribe voluntarily close the casinos to ensure public safety and end the occupation. The Tribe agreed and closed the casinos. During the shutdown, the FBI took possession of the Tribe’s financial records. The State and NIGC allowed the casinos to reopen in June 1997, provided SGEC would take a number of steps to improve casino operations and investigate illegal activity.

¶13 In January 1998, Derickson was indicted by the United States for embezzlement. Ultimately, Derickson would admit to embezzling a total of

² Shinnars’ 1993 and 1994 audit opinions were disclaimed by the firm. Only the 1995 audit carried an opinion that it accurately represented SGEC’s financial status.

\$370,796.34 from the Tribe. He admitted he drafted invoices, had them approved by Smith, and then submitted them to SGEC for payment. Derickson stated he used most of the money for himself, although he evidently paid some to Smith. Derickson's embezzlement began around October 1995 and continued through July 1997, even while the casinos were closed. Two days after the January 1998 indictment, NIGC closed the casinos for failure to comply with the 1997 conditions as well as other NIGC requirements. The casinos reopened in April 1998.

¶14 The Tribe and SGEC (hereafter, collectively, "the Tribe") sued Shinners, claiming breach of contract and negligent failure of Shinners to exercise reasonable care in providing accounting services. The Tribe claimed that Shinners was responsible for creating an environment that allowed Derickson to embezzle from the Tribe. The Tribe sought damages for Derickson's embezzlement and lost profits from the casino closings.³

¶15 The jury found for the Tribe on both the breach of contract and negligence claims. It awarded the same figure to the Tribe for both theories: approximately \$373,000 for Derickson's embezzlement and 1.4 million dollars for lost profits. The jury also determined that, regarding the negligence claim, the Tribe was 20% contributorily negligent.⁴

³ There was also an allegation that Ackley had embezzled, but the jury awarded \$0 on that part of the claim.

⁴ The actual dollar amounts filled in by the jury on the verdict forms were different, but the parties agreed that the jury had evidently taken it upon itself to reduce the negligence awards. The values on the negligence verdict were the values of the contract verdict, reduced 20%.

¶16 Post-verdict, the court reduced the award for Derickson's embezzlement to the approximate \$370,000 he admitted stealing. It also struck the lost profit award, concluding public policy did not allow such a recovery. However, the court declined to change the jury's answers on Shinners' liability and refused to reduce the damages on the contract claim to reflect the jury's finding of contributory negligence.

¶17 The parties agreed that the Tribe could not recover both for the tort and the breach of contract, so the Tribe elected the contract damages. The court entered judgment for the Tribe in the amount of \$370,796.34—the amount Derickson embezzled. Shinners appeals the jury's verdict that it was negligent and the court's decision not to reduce the contract damages. The Tribe cross-appeals the court's striking of the lost profit award as well as an earlier decision not to submit a punitive damages question to the jury.

Discussion

¶18 Shinners' appeal is essentially two-fold. First, it argues this case is only a tort, not a contract, action. Second, Shinners argues that there is insufficient evidence to support the verdict, although its sufficiency discussion addresses very little about the contract.

I. Contract v. Tort

¶19 Neither party disputes the characterization or application of the engagement letters as the factual bases for the contract claims. Based on the contracts, the jury concluded Shinners breached an implied duty of good faith in performing the contract. Based on the instruction, the jury determined the good faith duty was breached when Shinners "fail[ed] to provide service that met

Generally Accepted Accounting Principles or Generally Accepted Auditing Standards....” The jury also concluded Shinnors negligently provided services to the Tribe by “fail[ing] to discover or recognize the importance of relevant facts or accounting principles which reasonably prudent accountants would discover or recognize,” or by failing to exercise skill or judgment consistent with that exercised by reasonable prudent accountants.

¶20 Shinnors contends the Tribe should not be able to elect a remedy because this case should be considered strictly a negligence action regardless how it was pled. Second, Shinnors surmises that even if the Tribe is allowed to elect contract damages, that award should also be reduced because the Tribe should not be allowed to avoid the jury’s contributory negligence finding. We disagree with both assertions.

A. Election of Remedies

¶21 The election of remedies doctrine exists to prevent double recovery or inconsistent remedies based on the same facts, such as a claim in tort and a claim in contract. *Bank of Commerce v. Paine, Webber, Jackson & Curtis*, 39 Wis. 2d 30, 36, 158 N.W.2d 350 (1968). Incongruous thought it may seem, the doctrine permits both theories to be pursued simultaneously, even to judgment, before election is required. *Id.* at 37. Thus, provided the Tribe has both a valid contract claim and a valid tort claim, there is no legal bar to the Tribe’s election of remedies.

B. Nature of the Claim

¶22 The heart of Shinnors’ argument, therefore, is that a claim based on a breach of generally accepted accounting principles (GAAP) or generally accepted

auditing standards (GAAS) is always a negligence action, in part because the duty to perform to those standards is grounded in the common law. This argument is made by citation to non-Wisconsin authority. The Tribe, however, relies on Wisconsin jurisprudence suggesting that its case is, in fact, grounded in both tort and contract. We agree with the Tribe, and begin by discussing these Wisconsin cases.

¶23 In *Colton v. Foulkes*, 259 Wis. 142, 47 N.W.2d 901 (1951), Colton hired Foulkes to repair his roof and porch railing. Foulkes’ employees failed to properly repair the railing by, among other things, using rotten wood for the posts. When Colton leaned against the railing, it collapsed and he was injured.

¶24 Colton brought a negligence claim against Foulkes, who asserted the claim was not one for tort but breach of contract. Our supreme court, in allowing the tort to proceed, wrote:

Ordinarily, a breach of contract is not a tort, but a contract may create the state of things which furnishes the occasion of a tort. The relation which is essential to the existence of the duty to exercise care may arise through an express or implied contract. Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and *a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract.*

Id. at 146 (emphasis added; citation omitted).

¶25 In *McDonald v. Century 21 Real Est. Corp.*, 132 Wis. 2d 1, 390 N.W.2d 68 (Ct. App. 1986), the McDonalds entered into a listing contract with Century 21. Part of the contract required the realtor to “prequalify” prospective buyers. The realtor failed to do so for a buyer whose offer was accepted. Believing their property sold, the McDonalds began constructing a new home.

The buyer, who had severe credit problems, backed out of the sale and left the McDonalds unable to afford the new construction.

¶26 The McDonalds sued the realtor in tort and contract. Before trial, they elected to proceed in tort only. The tort claim was ultimately rejected by this court, because the obligation to prequalify was voluntarily assumed by the realtor. In reaching this conclusion, we explained, “there will be liability in tort for misperformance of a contract whenever there would be liability for gratuitous performance without the contract.” *Id.* at 6 (citation omitted). That is, “torts consist of the breach of duties fixed and imposed upon the parties by the law itself The true source [of liability] is the common law governing tort actions” *Id.* at 7-8. Thus, in *McDonald*, because the realtor had no common law duty to prequalify buyers—only a contractual duty—the tort could not be pursued. But we also noted in that case that “where a tort duty coincides with an obligation undertaken in a contract, *either a contract or a tort action will lie* for its breach.” *Id.* at 8 (emphasis added).

¶27 In *Brooks v. Hayes*, 133 Wis. 2d 228, 395 N.W.2d 167 (1986), a subcontractor negligently installed a fireplace, resulting in structural damage to the Brooks’ home. They sued the general contractor, Hayes, but the trial court dismissed the action against him. This court affirmed Hayes’ dismissal on the independent contractor rule, which states that “one who contracts with an independent contractor is not liable to others for torts of the independent contractor.” *Id.* at 233 (citation omitted).

¶28 On appeal, the Brookses argued, and the supreme court agreed, that the contract implicitly imposed a duty on Hayes to perform with due care. The

court undertook the contract-or-tort analysis as a precursor to rejecting the independent contractor defense:

The courts and commentators have recognized that *there are facts that may give rise to both an action in contract and one in tort, and in such cases the plaintiff may choose between the two*. ... According to conventional wisdom, a tort arises from a violation of some obligation imposed by law (ex delictu) and a breach of contract arises from a violation of an obligation assumed consensually (ex contractu). ... The overlap between tort and contract is evident in this court's observation that "accompanying every contract is a common-law duty to perform it with care and skill, and a failure to do so is a tort as well as a breach of contract."

Id. at 246 (emphasis added; citations omitted). Ultimately, the court concluded that both a tort and contract claim existed.⁵

¶29 In *Milwaukee Partners v. Collins Eng'rs, Inc.*, 169 Wis. 2d 355, 485 N.W.2d 274 (Ct. App. 1992), Milwaukee Partners hired Collins Engineers to inspect a building Milwaukee Partners wanted to purchase. It told Collins that it would not purchase the building unless structurally sound. Collins' report essentially certified the building's safety and Milwaukee Partners purchased the property. When Milwaukee Partners attempted to sell the building, however, the prospective buyer's engineers determined the building might not be sound.

¶30 Milwaukee Partners sued Collins for negligence, arguing it failed to exercise the required degree of professional care in its inspection. Collins asserted that Milwaukee Partners had only a contract claim against it, not a tort action, and

⁵ That case was remanded for a new trial because of an insufficient factual record, since the trial court had initially accepted the independent contractor rule as a basis for dismissing the underlying complaint.

the statute of limitations had run on the contract claim. Again, we were called upon to determine if a tort claim, as pled, existed. We determined it did, because a duty to exercise professional care exists at common law regardless whether a contract exists. *See id.* at 363.

¶31 These cases each explained when a tort claim existed, regardless whether a contract claim also existed. None of these cases asked whether, or held that, because a tort action based in the common law existed, a contract action necessarily did not. That is the holding Shinnors would have us adopt, but there simply is no legal basis for such a holding.

¶32 We find further support in a case we decided recently: *Kerry, Inc. v. Angus-Young Assocs., Inc.*, 2005 WI App 42, __ Wis. 2d __, 694 N.W.2d 407 (petition for review filed March 25, 2005). Kerry retained Rust, an engineering firm, to inspect a building near a river that Kerry was considering purchasing. Rust issued a report based on its inspection. *Id.*, ¶3. Kerry then retained Angus-Young to perform architectural services related to the building's renovation. *Id.*, ¶4. Under the terms of the contract, Angus-Young was retained to provide "normal structural, mechanical and electric engineering services." *Id.*, ¶15.

¶33 Kerry provided Angus-Young with Rust's report. Once renovations began, substantial problems with the building's foundation were discovered. *Id.*, ¶4. Kerry claimed that had it known of the problems, it would not have started the renovations. Kerry sued Angus-Young for breach of contract, professional negligence, and misrepresentation, alleging that Angus-Young had failed to properly review Rust's report and determine the renovation's actual cost. *Id.*, ¶5. Angus-Young moved for summary judgment, which the trial court granted. *Id.*,

¶6. We reversed, thereby reinstating both the contract and professional negligence claims. *Id.*, ¶¶18, 25.

¶34 The common law standard of care for architects is well-established in Wisconsin, and Angus-Young claimed its contract absolved it of that duty. *Id.*, ¶8. We disagreed—nothing in the contract’s language limited Angus-Young’s responsibility to the standard of care. *Id.*, ¶18. Moreover we determined Kerry had submitted sufficient evidence on the contract and negligence claims, in the form of expert testimony, allowing it to survive summary judgment. *Id.*, ¶17

¶35 Kerry’s expert opined that under the common law, Angus-Young failed to meet the applicable standard of care by failing to determine the overall scope of the necessary work, in part by failing to evaluate the Rust report’s adequacy and bringing any deficiencies to Kerry’s attention. *Id.*, ¶17. Under the contract, the expert said, the term “normal structural, mechanical and electric engineering services” encompassed an obligation of Angus-Young to review the Rust report and recommend further inspection if needed. *Id.*

¶36 In other words, while the contractual duty and the common law duty were, according to the expert, virtually identical, we concluded there was sufficient evidence for both and allowed both to proceed. This appears to be exactly the kind of action contemplated in *McDonald*, where the tort duty coincides with the contractual obligation. *McDonald*, 132 Wis. 2d at 8. The situation is parallel to the Tribe’s case against Shinnars. While accountants have a common law duty to perform their services according to the generally accepted practices and standards, Shinnars also undertook that duty under the contract.

¶37 Even without this line of cases to guide us, every contract is accompanied by an implied duty of good faith in its performance. This is a duty

that exists, however, only because the contract exists. The duty of good faith contemplates that “neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.” 17A AM. JUR. 2D *Contracts* § 370 (2004); WIS JI—CIVIL 3044. The duty “requires the parties to perform ... the obligations required by their agreement.” 17A AM. JUR. 2D *Contracts* § 370. The covenant is broken “when either party violates, nullifies, or significantly impairs any benefit of the contract.” *Id.* Thus, if the jury concluded Shinnors failed to correctly or adequately perform its services under the contract, it could find that Shinnors breached its duty of good faith, just as it was instructed.

C. Contract Damages Reduction

¶38 Shinnors argues, in a heading, that “the court erred in permitting the Tribe to elect contract damages not offset by the [T]ribe’s contributory negligence.” We have already decided the propriety of the election of remedies and that section of Shinnors’ brief is largely dedicated to that tort versus contract argument. To the extent that Shinnors would have us reduce the contract award by twenty percent, there are two problems. First, save for the argument heading and a conclusory statement that “at a minimum Shinnors is entitled to have the damages reduced” by the twenty percent, the argument is undeveloped. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (we decline to address underdeveloped and unexplained arguments). Second, a reduction for contributory negligence is simply not appropriate in a contract case. *See*

Vanningan v. Mueller, 208 Wis. 527, 536, 243 N.W. 419 (1932). We therefore reject Shinners' argument.⁶

D. Alternate Ground for Affirmance

¶39 Alternatively, we conclude Shinners has waived any objections it might have to the case proceeding on a contract claim. If Shinners believed the Tribe had no contract claim, it should have moved to have it dismissed, objected to the jury instruction on breach of contract, made a postverdict motion or otherwise expressed its disagreement to the trial court first. It did none of these things.

¶40 Failure to object to proposed jury instructions normally constitutes waiver. *See* WIS. STAT. § 805.13(3)(2003-04). Thus, “[w]e will seldom rescue parties from the effects of erroneous instructions they allow the trial court to submit without objection.” *Barnhill v. Board of Regents*, 158 Wis. 2d 278, 312, 462 N.W.2d 249 (Ct. App. 1990), *rev’d on other grounds*, 166 Wis. 2d 395, 479 N.W.2d 917 (1992). Moreover, an appealing party has the burden of establishing the issue was raised in the circuit court, *State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997), because we generally decline to resolve issues raised for the first time on appeal. *Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

⁶ The Tribe also argues that when a loss is solely economic, contract principles, not tort principles, were meant to govern under the economic loss doctrine. It relies on *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶23, 270 Wis. 2d 146, 677 N.W.2d 233, for that proposition. We reject the Tribe’s contention. First, the Tribe neglects to quote the very next paragraph which explains that the economic loss doctrine “precludes recovery in tort for economic loss resulting from the failure of a product” to meet expectations, not failure of a service. *Id.*, ¶24. Moreover, case law establishes that economic loss doctrine notwithstanding, professionals may be liable in tort even when damages are strictly economic losses. *See Kerry Inc. v. Angus-Young Assocs., Inc.*, 2005 WI App 42, ¶9, ___ Wis. 2d ___, 694 N.W.2d 407 (petition for review filed March 25, 2005) (citing *Milwaukee Partners v. Collins Eng’rs, Inc.*, 169 Wis. 2d 355, 363 n.3, 485 N.W.2d 274 (Ct. App. 1992)). *See also Insurance Co. of N. Amer. v. Cease Elec., Inc.*, 2004 WI 139, ¶53, 276 Wis. 2d 361, 688 N.W.2d 462.

II. Sufficiency of the Evidence

¶41 Shinnars argues that there is insufficient evidence to support either verdict. Since the Tribe only recovers on contract, we limit our review to the sufficiency of the evidence for that claim.

¶42 We will not disturb a jury verdict if there is any credible evidence to support it. *Meurer v. ITT Gen. Controls*, 90 Wis. 2d 438, 450, 280 N.W.2d 156 (1979). We view the evidence in the light most favorable to the verdict. *Id.* This is particularly true when, as here, the trial court approves the jury verdict. *Id.* Thus, we review the case for credible evidence to sustain the jury's verdict, not for evidence supporting an alternate verdict that that jury could have but did not reach. *Id.*

¶43 Here, the question is whether, by failing to conform to the generally accepted accounting standards, Shinnars breached its good faith duty in performing its contract. We conclude there is sufficient evidence from which the jury could have answered that question affirmatively.

¶44 While performing the 1995 audit, Shinnars conducted “field work” which ended in December 1995. Shinnars' expert testified that during field work, auditors have a duty to “not close their eyes.” Shinnars' contract also stated that as part of its adherence to professional standards, it would test documentary evidence, including checking physical existence of inventories.

¶45 Derickson's embezzlement began with the septic project, budgeted at \$150,000. By September 30, 1995—before the end of the audit year—\$77,000 had been posted to the septic account. The first fraudulent invoice was paid in mid-October. By November 28, 1995, \$118,491 had been spent, and all the Tribe

had to show for expending 80% of the project's budget was a pile of gravel in the parking lot.

¶46 The jury could have concluded that Shinners failed to properly verify the physical inventory relating to the septic project account, especially given the open and notorious nature of a \$120,000 pile of gravel. From this evidence, the jury could have concluded that Shinners, while conducting its field work through December, had “closed its eyes” to the reality surrounding the septic project. The jury could further have determined that Shinners failed to conduct any documentary evidence testing at all through 1995.⁷

¶47 Shinners also stated it would notify the Tribe immediately if circumstances arose that would prevent Shinners from completing an audit, and it would verify account liabilities through letters and correspondence with customers. By May 1996, \$249,695 had been spent on the septic project. It is evident that Shinners' representatives visited the Tribe on an ongoing basis, and not just in October to begin an audit. Shinners contended that it informed several SGEC and Tribe members, including Smith, Ackley, and Jim Van Zile, of its concerns. Shinners claims it even advised Smith to stop paying septic invoices. Van Zile could not recall being informed of problems. SGEC's counsel likewise testified Shinners never informed him of any problems. It was not until November 1996 that Shinners attempted to verify certain accounts payable through certified

⁷ This inference can be drawn in two ways. First, Shinners eventually did attempt to test accounts payable, but not until 1996 and at that time, discovered Derickson's shell companies. The jury could infer that had Shinners attempted such verification in 1995 as part of its field work, it would have discovered the problem a year earlier. The jury could also have inferred that, had Shinners reconciled the \$120,000 worth of paid invoices with the physical inventory related to the septic project, it would have known there should have been more than just gravel.

letters. Moreover, following its completion of the 1996 audit, it refused to issue its final opinion to the Tribe.

¶48 The jury could have concluded that from the December 1995 field work, Shinnors should have discovered the excessive spending with no corresponding inventory. However, because it was November 1996 before Shinnors sent letters to verify the payees, the jury could have concluded that Shinnors failed to timely or adequately investigate the Tribe's accounts. It could also conclude Shinnors failed to timely notify the Tribe of circumstances that would cause Shinnors to be unable to complete the audit. Thus, there is evidence from which the jury could infer at least four failures by Shinnors to perform its contract in good faith.

III. Cross-Appeal

¶49 The Tribe cross-appeals the court's determination to strike an award for lost profits from closing the casinos, as well as its decision to keep a punitive damages instruction from the jury. We reject both claims.

¶50 The Tribe has insisted that it be allowed to elect the contract remedy; likely because, as Shinnors complains, it is unreduced for the Tribe's contributory negligence. But an important consequence of that election is that a party recovering on a contract is not entitled to collect punitive damages. *Tietzworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶28, 270 Wis. 2d 146, 677 N.W.2d 233 (quoting *Digicorp, Inc. v. Ameritech Corp.*, 2003 WI 54, ¶75, 262 Wis. 2d 32, 662 N.W.2d 652 (Sykes, J., concurring in part and dissenting in part.)). Thus,

even if there were error in the initial failure to submit the question, any error is harmless because the Tribe elected the contract remedy.⁸

¶51 Damages for lost profits, however, are sometimes recoverable. *See Magestro v. North Star Env't Const.*, 2002 WI App 182, ¶14, 256 Wis. 2d 744, 649 N.W.2d 722 (citing *Buxbaum v. G.H.P. Cigar Co.*, 188 Wis. 389, 392, 206 N.W. 59 (1925)). To recover consequential damages for lost profits, there must be three determinations: (1) the defendant's contractual breach must proximately cause the alleged damages; (2) the damages should have been reasonably foreseeable; and (3) any future profits must be proven with "reasonable certainty." *See* RUSSELL M. WARE, *THE LAW OF DAMAGES IN WISCONSIN* § 26.4, at 26-6 (2d ed. 1995). The trial court concluded that lost profits were not the natural and probable result of the breach. We essentially agree: the Tribe did not demonstrate the breach was the proximate cause of the damages, nor were the events leading to the casinos' closing reasonably foreseeable.

¶52 We assume without deciding that the Tribe has correctly asserted that the embezzlement and attraction of state regulators were the natural and foreseeable result of the breach. Nonetheless, a subsequent chain of events intervened and led to closure, and we do not view those events as naturally and probably flowing from the breach, nor do we consider them reasonably foreseeable.

¶53 The first time the casinos were closed was when Tribe members occupied the bingo hall and business offices and the State and NIGC suggested the

⁸ The Tribe has not argued that had it been awarded punitive damages; it might have instead elected the tort remedy.

Tribe close the casinos for safety. The Tribe has not suggested or shown the members knew about the embezzlement—only that they were unhappy with Tribal management. These same complaints about management were on file with the State long before the embezzlement was revealed to regulators. Shinnery was retained only to establish financial controls for SGEC, not management controls for the Tribe. The second closure came because the Tribe failed to comply with assurances it had made to the State in order to reopen after the first closure, along with violations of NIGC requirements, including the hiring of a different, independent auditor.

¶54 It is neither a natural and probable result of Shinnery's breach of contract, nor is it reasonably foreseeable, that Tribe members would complain to regulators about management and then stage a sit-in. It is not a natural and probable result of the breach, nor is it reasonably foreseeable, that the Tribe would fail to follow the conditions for reopening. Thus, we affirm the trial court's decision to strike the award for lost profits.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

